U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 10 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) summarily dismissed the appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner filed the Form I-140 petition on November 15, 2011, seeking classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a biomedical researcher at , operated by The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director denied the petition on August 3, 2012, having found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On September 5, 2012, the petitioner filed a skeletal appeal and indicated that a "brief and/or additional evidence will be submitted to the AAO within 30 days." The AAO summarily dismissed the appeal on December 27, 2012, stating:

> The U.S. Citizenship and Immigration Services [USCIS] regulation at 8 C.F.R. § 103.3(a)(1)(v) states, in pertinent part, "[a]n officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal."
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> On the Form I-290B Notice of Appeal, filed on September 5, 2012, the petitioner disputes the director's decision in general terms but makes no specific allegation of error. She asserts: "In the brief to be submitted, I will show that the evidence submitted, together with additional evidence that may be submitted, does in fact meet all of the elements requirements [*sic*] for a national interest waiver." The bare assertion that the director somehow erred in rendering the decision is not sufficient basis for a substantive appeal.
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> The petitioner indicated that she would submit her brief within thirty days. To date, over three months later, careful review of the record reveals no subsequent submission; all other documentation in the record predates the issuance of the notice of decision. Therefore, the record contains no substantive appeal; only a statement of intention to submit one.
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> Because the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact as a basis for the appeal, the AAO must summarily dismiss the appeal.

The petitioner has now filed a motion to reopen and reconsider the AAO's decision.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner, on motion, makes the following allegation of error: "In fact, I submitted my subsequent supporting document within 30 thirty [*sic*] days through USPS certified mail, and it was received by USCIS on 10/10/2012." The petitioner submits copies of the documents submitted to support the appeal, and a copy of a postal receipt showing delivery of the supplemental materials.

The postal receipt shows that the USCIS Phoenix Lockbox received the brief on October 10, 2012. A benefit request will be considered received by USCIS as of the actual date of receipt at the location designated for filing such benefit request whether electronically or in paper format. 8 C.F.R. § 103.2(a)(7)(i). Whenever a person has the right or is required to do some act within a prescribed period after the service of a notice upon him and the notice is served by mail, 3 days shall be added to the prescribed period. 8 C.F.R. § 103.8(b). Wednesday, October 10, 2012, fell 35 days after the appeal's filing date. Therefore, even allowing an extra three days to account for mailing, USCIS did not receive the brief within the 30 days that the petitioner specified on appeal.

Furthermore, the cited regulation at 8 C.F.R. § 103.2(a)(7)(i) requires "receipt at the location designated for filing." The instructions to Form I-290B indicate that, while the petitioner may not file an appeal directly with the AAO, any subsequent brief or supplement must be mailed directly to the AAO at an address provided in the instructions. The petitioner did not follow those instructions, instead mailing the brief to an address in Phoenix dedicated solely to processing filings.

The petitioner did not submit the brief to the correct address or in a timely manner. The AAO was correct in stating that the record, at the time of the appeal's adjudication, did not contain a timely brief. Therefore, the petitioner has not shown that the AAO's decision was incorrect. The motion does not meet the requirements of a motion to reconsider.

The motion also does not meet the requirements of a motion to reopen. The only new fact alleged on motion is the AAO's claimed failure to consider a timely submitted supplement to the appeal. As shown above, the petitioner submitted the brief in an untimely manner, to the wrong address.

Review of the materials shows that the petitioner would not have prevailed on the merits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –

> (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of Job Offer –
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> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

The USCIS regulation at 8 C.F.R. § 204.5(k)(4)(ii) requires that a petitioner seeking to apply for the exemption must submit Form ETA-750B, Statement of Qualifications of Alien (or corresponding sections J, K and L of ETA Form 9089), in duplicate. The record does not contain this required document, and therefore the petitioner has not properly applied for the national interest waiver.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial

intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field.

The petitioner had previously filed an earlier petition, seeking the same classification and the national interest waiver, on January 18, 2009. The Director, Nebraska Service Center, denied that petition on February 18, 2010, and the AAO dismissed the petitioner's appeal of that denial on July 5, 2011. Four months after the dismissal of that appeal, the petitioner filed the present petition, relying on the same basic claim and many of the same exhibits.

Most of the petitioner's introductory letter, dated November 13, 2011, duplicates her earlier introductory letter of January 15, 2009, that accompanied her first petition. Every letter that accompanied the filing of the 2011 petition had previously appeared in the record of proceeding of the 2009 petition. When the petitioner appealed the denial of the second petition in September 2012, her statement on Form I-290B, Notice of Appeal or Motion, was virtually identical to her then-attorney's statement on the first appeal in March 2010. Likewise, the appellate brief that the petitioner submitted in October 2012 is mostly copied from her attorney's April 2010 brief submitted in support of the first appeal. Overall, the petitioner's appellate brief, which is just over six pages long, includes nearly five pages copied directly from her attorney's earlier appellate brief with few changes except for pronoun substitution. For example, the following passage from the 2010 brief:

> The Nebraska Service Center did not challenge the fact that Petitioner/Appellant meets the requirements being and [*sic*] an advanced degree professional. . . .
>
> The Nebraska Service Center explicitly acknowledged that Petitioner/Appellant meets the first two elements of the national interest waiver test. . . .

became the following passage in the 2012 brief:

> The Texas Service Center did not challenge the fact that I meets [*sic*] the requirements being and [*sic*] an advanced degree professional. . . .
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> The Texas Service Center explicitly acknowledged that I meets [*sic*] the first two elements of the national interest waiver test. . . .

In resubmitting exhibits and statements from the prior petition, the petitioner did not address or rebut the July 2011 appellate decision that already addressed those elements of the record. To discuss them again at length would be redundant. The July 2011 appellate decision reads, in part:

> The petitioner is involved with the National Institutes of Health (NIH) funded clinical study entitled [redacted] The petitioner submitted published material about the study. Eligibility for the waiver, however, must rest with the alien's own qualifications rather than with the position sought. In other words, U.S. Citizenship and Immigration Services (USCIS) generally does not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221. . . .
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> [redacted] of the [redacted] discusses the petitioner's work for [redacted] in his laboratory. While [redacted] explains the importance of the project, the mere fact that the petitioner may play an important role in her current activity is insufficient to establish eligibility for a waiver of the alien employment certification because qualified U.S. workers may be available to play a similar role. *Id.* at 223. [redacted] further states:
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> > [The petitioner] possesses not only extensive knowledge and critical thinking skills, but also a repertoire of essential molecular biology skills that are crucial to the execution of my research projects, such as DNA/RNA/protein isolation, RT-PCR, methylation-specific PCR, immunohistochemistry, western blotting, adenovirus mammalian cell transfection, fluorescence microscopy, and mammalian primary cell culture. In addition, her dual degree in applied statistics allows her to have a deeper understanding of the statistical methods and analyses used, which propels her to the forefront of biological research compared to others without a statistics background.
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> Regarding the [redacted] project specifically, [redacted] asserts that the petitioner measures ROS and respiratory control ratios (RCR) and explains the importance and

> complexities of these measurements to the project. further asserts that the petitioner "is also responsible for measuring two biomarkers of oxidative stress *in vitro*: DNA damage in blood and oxidative stress in protein." concludes that the petitioner "is one of the few in the United States who have the knowledge and skills to measure RCR." asserts that the alien employment certification process might result in hiring an available U.S. worker "with minimal qualifications" who might be unable to successfully perform the work the petitioner is doing. further asserts that "training a new person to replace [the petitioner] is an impossible solution.". . .
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> has never explained why the petitioner's skills, enumerated above, are not amenable to articulation on an application for alien employment certification. As stated in *NYSDOT,* 22 I&N Dec. at 221, it cannot suffice to state that the alien possesses useful skills, or a "unique background.". . .
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> While the petitioner has produced some evidence of outside interest in her protocols, that evidence is minimal. Ultimately, the basis for requesting a waiver of the alien employment certification is the claimed shortage of available U.S. workers with the petitioner's laboratory skills and experience and the importance of the project on which the petitioner is working. The AAO unequivocally rejected claims of unique skills as a basis for a waiver of the alien employment certification process in the national interest. *NYSDOT,* 22 I&N Dec. at 221. The mere fact that the petitioner may play an important role in the activity to be performed for her employer is insufficient to established eligibility for a waiver of the alien employment certification because qualified U.S. workers may be available to play a similar role. *Id.* at 223. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.*

The new portions of the brief consist of the last two paragraphs on page 4, all of page 5, and the first two sentences on page 6. In those passages, the petitioner discussed some of the new exhibits not addressed in the 2011 appellate decision. Those exhibits consist of the following:

Initial submission:

- Two articles published in 2011
- Evidence of publication of a previously submitted manuscript
- Three manuscripts submitted for publication
- Three conference papers

Response to February 28, 2012 request for evidence:

- April 25, 2012 letter from the petitioner's supervisor,
- Evidence of the petitioner's participation in peer review
- Updated evidence of citation of her work

October 12, 2012 appeal supplement:

- An article by the petitioner published in July 2012
- A July 2011 master's thesis citing one of the petitioner's articles

The petitioner's resubmission of the brief also included a printout from the Google Scholar search engine, establishing the citation history of her published work. The printout is dated January 25, 2013, and therefore could not have accompanied the October 2012 appellate submission.

in his latest letter, stated that the petitioner developed a respiratory control ratio (RCR) protocol for human skeletal muscle where others had failed, and that other researchers now use the protocol in other laboratories. The petitioner submitted no evidence to support this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Furthermore, while innovation of a new method is of greater importance than mere training in that method, it must be stressed that such innovation is not always sufficient to meet the national interest threshold. For example, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case by case basis. *NYSDOT*, 22 I&N Dec. 221, n.7.

The petitioner asserts: "I have published 4 papers in high impact factor journals and further shows that my contributions are superior to my peers." A journal's impact factor is calculated from the average citation rate of papers published in that journal. The appearance of a paper in a high-impact journal does not automatically make the paper itself high-impact. Rather, it is the aggregate impact of the individual papers that give the journal a high impact factor. Thus, the petitioner must show heavy citation of her own papers; it cannot suffice to show that her papers appeared in journals that have published heavily cited articles by others.

The 2013 Google Scholar printout showed six citations of one article (including at least one self-citation by the petitioner's co-authors), and 13 of another (including at least three self-citations by co-authors). The petitioner did not show that this level of citation demonstrated a consistent pattern of impact and influence on the field that would warrant the national interest waiver.

For the reasons discussed above, the brief and exhibits that the petitioner submitted on motion would not have resulted in approval of the petition, even if the petitioner had timely submitted them to the proper address.

The petitioner's latest filing does not meet the requirements of a motion to reopen or a motion to reconsider, and therefore the USCIS regulation at 8 C.F.R. § 103.5(a)(4) requires its dismissal.

ORDER: The motion is dismissed.